

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

Office of Dispute Resolution and Administrative Services

In re: STUDENT ¹	}	
	}	Hearing Officer: Peter B. Vaden
Due Process Hearing	}	
(City Public Schools)	}	

ORDER OF DISMISSAL
(Corrected Right to Appeal Notice)

This matter was brought upon the Administrative Due Process Complaint Notice filed by PARENT under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81-210 ("Virginia Regulations"). On October 7, 2013, the parties convened for the scheduled due process hearing at the City Public Schools Plaza Annex. Instead of proceeding with the hearing, Parent, through EDUCATIONAL ADVOCATE, requested leave to withdraw her complaint without prejudice. The request was opposed by Respondent City Public Schools ("CPS"). For the reasons explained below, I deny Parent's request and dismiss this case with prejudice.

Factual Findings

1. This case concerns allegations that the Local Education Agency ("LEA"), CPS, denied Student a free and appropriate public education ("FAPE") during the 2012-2013 school year and that the LEA violated Section 504 of the Rehabilitation Act of 1973, by allegedly failing to

¹ Personal identification information is provided in Appendix A.

address in-school bullying of Student. For relief, the Parent sought an order for CPS to fund Student's enrollment, including transportation costs, at NONPUBLIC SCHOOL for the 2013-2014 school year, a compensatory education award in the form of counseling/therapy for the harm suffered by Student as a result of the alleged bullying, training for school personnel on addressing bullying, and reimbursement of legal fees and costs. Due Process Complaint.

2. Parent's complaint in this case is identical to a prior Request for Due Process Hearing she filed, dated June 6, 2013. Parent withdrew the prior complaint, without prejudice, before the due process hearing. Parent represents that she withdrew the complaint the first time because of the illness of her mother. Statement of Educational Advocate. The present case was initiated by an August 2, 2013 cover letter to CPS from Educational Advocate, to which she attached a copy of the June 6, 2013 Request for Due Process Hearing.

3. On August 26, 2013, the Hearing Officer convened a telephone prehearing conference to discuss the issues to be decided, the hearing date and other matters. Parent and Educational Advocate participated in the prehearing conference. During the prehearing conference, the Hearing Officer inquired whether Parent would have legal representation. Educational Advocate advised that no attorney was expected to be involved for Parent, but that all participants would be advised if an attorney were to become involved. During the prehearing conference, the parties agreed that the due process hearing would be held from October 7 through 10, 2013 in

. The Hearing Officer set a deadline of September 30, 2013 for the respective parties' disclosure of potential hearing witnesses and exhibits. On August 26, 2013, the Hearing Officer issued a Prehearing Order (the "Prehearing Order"), setting forth the hearing date and other matters agreed upon or ordered in the prehearing conference. The Prehearing Order provides that "[t]he

parties and their counsel/advocate will be held to the matters agreed upon, ordered, or otherwise set forth in this Order. See Prehearing Order.

4. On August 29, 2013 and September 24, 2013, on behalf of Parent, Educational Advocate, requested the Hearing Officer to issue witness subpoenas to summon some 13 CPS employees to testify for Parent at the due process hearing. Twelve of the thirteen requested LEA employee witnesses were included in the September 24, 2013 subpoena request, all on the same subpoena form. The Hearing Officer informed Educational Advocate that Petitioner would have to submit separate subpoena forms for each witness. See emails between Educational Advocate and Hearing Officer.

5. At the request of Educational Advocate, the Hearing Officer convened a second telephone prehearing conference on September 26, 2013. During the September 26, 2013 conference, CPS' Counsel agreed to have the CPS employees, whose testimony Educational Advocate requested, appear to testify, without subpoena. See September 26, 2013 email from Hearing Officer to Educational Advocate and CPS' Counsel.

6. On September 30, 2013, Parent and CPS served their respective disclosures of potential hearing witnesses and exhibits. The Hearing Officer received no further communications from Parent or Educational Advocate before the scheduled October 7, 2013 hearing date.

7. On Sunday, October 6, 2013, the evening before the scheduled due process hearing, CPS' Counsel made a courtesy call to the Hearing Officer, who was then *en route* to , to advise that she had just received an email from Educational Advocate advising her that Petitioner would withdraw her complaint. Educational Advocate did not copy this email to the Hearing Officer. CPS' Counsel indicated that she hoped that by alerting the Hearing Officer of

Educational Advocate's communication, the Hearing Officer might be able to hold a telephone conference to confirm Parent's intentions. However, due to the late notice, it was not possible to convene a telephone conference.

8. On October 7, 2013, when the Hearing Officer arrived at Plaza Annex in for the due process hearing, Parent, through Educational Advocate, requested leave to withdraw her due process complaint without prejudice.² The reasons offered by Educational Advocate for the Parent's request to withdraw were (i) in CPS' 5-day disclosures, Educational Advocate found documents pertaining to other students and Parent was concerned about the misuse of confidential educational records pertaining to other students; and (ii) Parent had communicated with an unidentified attorney with regard to CPS' alleged violations of student confidentiality and about representing Parent on Student's due process claims.

9. The unidentified attorney has not communicated with the Hearing Officer and did not appear for the due process hearing.

10. CPS' Counsel stated that the LEA objected to granting the Parent's request for withdrawal without prejudice on the grounds that Parent's stated concerns over alleged breaches of confidentiality were not germane to this case and because this would be Parent's second withdrawal, without prejudice, of this due process complaint.

11. After considering the Parent's request and the LEA's objection, the Hearing Officer informed the Parent that under the circumstances, he would not dismiss the complaint without prejudice and that Parent must either proceed with the due process hearing as scheduled or suffer

² The October 7, 2013 hearing was held on the record and was recorded by a court reporter.

a dismissal with prejudice. The Hearing Officer recessed the hearing to allow Parent to consult with Educational Advocate. Following the recess, Educational Advocate informed the Hearing Officer that Parent had conferred with an attorney and would not proceed with the case. Parent, personally, confirmed this was her intention. The Hearing Officer then informed the parties that he would issue a final written order dismissing the case with prejudice. Parent noted her exception to this ruling. The Hearing Officer ended the hearing.

Analysis

Under the Virginia Regulations, the hearing officer is responsible for moving the case to conclusion, including dismissing the pending proceeding if either party refuses to comply in good faith with the special education hearing officer's orders. *See* 8 VAC 20-81-210.M. The parent is required to make timely and necessary responses to the special education hearing officer, and, specifically, to provide information to the hearing officer to assist in the special education hearing officer's administration of a fair and impartial hearing. *See* 8 VAC 20-81-210.M.

A request by a parent to withdraw a due process complaint without prejudice is normally liberally granted. Here the circumstances are different. This is the second withdrawal by Parent of the identical complaint. Moreover, I find that Parent's decision not to proceed with her case, without notifying LEA until the evening before the hearing date, raises concerns about the Parent's good faith. In order to prepare for the due process hearing, CPS put together an exhibit book of over 200 proposed exhibits. At Educational Advocate's request, CPS required some 13 LEA employees to be available to testify for Parent at the due process hearing. By not disclosing her intention not to proceed with the case, until Sunday evening before the Monday morning hearing, Parent needlessly increased the LEA's hearing preparation workload and costs and disrupted the

Parent needlessly increased the LEA's hearing preparation workload and costs and disrupted the witnesses' work schedules.

With regard to Educational Advocate's assertion that Parent has now found an attorney who will assist her, no justification was offered for not providing that information to the Hearing Officer until the morning of the due process hearing. At the Prehearing Conference, Educational Advocate committed to informing the Hearing Officer if an attorney were to become involved for Parent. Moreover, while a parent's decision to retain an attorney may warrant a continuance if requested by the attorney, no attorney has appeared for Parent in this case.

In summary I conclude that, considering the failure of Parent or Educational Advocate to provide reasonable notice to the LEA or the Hearing Officer of Parent's decision not to proceed with the due process hearing, and the fact that Parent has already withdrawn this due process complaint once without prejudice, Parent's request to withdraw her complaint without prejudice a second time ought not to be granted. Accordingly, this case is dismissed with prejudice.

IT IS SO ORDERED.

Date: October 9, 2013



Peter B. Vaden, Hearing Officer

Hearing Officer Contact Information:

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RIGHT OF APPEAL NOTICE

A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a federal district court within 90 days of the date of this decision, or in a state circuit court, within 180 calendar days of the date of this decision.